

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE**
45 Fremont Street
San Francisco, CA 94105

June 2, 2009

REG-2008-00022

**TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER
SUBCHAPTER 3. INSURERS**

Summary and Response to Comments Received On or Before
August 15, 2008 Comment Period Deadline

Commenter: Craig C. Paige on behalf of the California Land Title Association

Date of Comment: Received August 12, 2008

Type of Comment: Written

Summary of Comment (page 1-2):

This passage summarizes the commenter's interest in these proceedings and the nature of the organization that the commenter is affiliated with.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed regulation or to the procedures followed in proposing the regulation. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Summary of Comment (page 2-3):

The commenter recites a passage from the Initial Statement of Reasons, describing the Commissioner's invitation to present reasonable alternatives to the proposed regulation and then offers alternatives that the commenter believes to be as effective and less burdensome.

The commenter believes that, without limitation, the Commissioner's regulation should reflect that the Commissioner will consider whether an entity's unlawful act was intentional or inadvertent, the frequency and extent of severity of the offending acts, and whether the entity discovered and/or corrected the offending act in question. In support of adding these considerations to the regulation, the commenter cites to Insurance Code sections 12413.1(i), 12414.14 and 12414.16, which touch upon issues relating to providing time to remedy rating violations and the Commissioner's authority to institute suspension or revocation proceedings when a violation is willful.

The commenter further contends that the Commissioner's regulation should consider the extent to which the Commissioner's examination of a regulated entity occurs with such frequency that it

becomes unreasonably burdensome upon that entity. The commenter provides suggested language to be inserted in the regulation in order to identify particular factors for the Commissioner's consideration, which would achieve the commenter's suggestions.

Response to Comment:

Except for the limited changes described below, the Commissioner respectfully declines to make any revisions to the regulation based upon this comment. The proposed regulation serves to identify the remedies available to the Commissioner in the event that an entity conducting the business of title insurance should fail to collect or report information required by Articles 5.5 or 6.9. The proposed regulation in no way precludes the Commissioner from taking into consideration factors required by statute under certain circumstances, such as whether an act (or failure to act) was intentional. For this reason, among others, the regulation references a number of provisions of law including those provisions that require the Commissioner to consider certain factors when deciding upon an appropriate enforcement remedy. Simply put, the Commissioner will only apply this regulation in a manner that is consistent with his statutory authority.

Insurance Code sections 12414.14 and 12414.15, among other sections, were added to the reference citation in response to comments such as this one in order to remove any doubt about the Commissioner's intentions.

Similarly, the regulation permits the Commissioner to exercise his discretion to consider other factors that are not required to be considered by statute. Thus, to the extent that the Commissioner believes that the frequency of conducting an examination of a particular insurer is relevant, he may consider this factor in fashioning an appropriate remedy.

Summary of Comment (page 4):

The commenter believes that the effect of the regulation should be postponed. In support of this contention, the commenter references a letter provided by the Commissioner, dated October 5, 2007 which, according to the commenter, would require the effect of the regulation to be delayed until January 1, 2010 in order to be consistent with the contents of the October 5 letter.

Response to Comment:

The Commissioner respectfully disagrees with this comment and declines to make any changes based upon it. There are no salutary reasons for delaying the effective date of the Commissioner's enforcement remedies regulation. The timing and imposition of remedies is subject to the Commissioner's discretion. Nothing within this regulation removes that discretion.

To the extent that this comment is directed at the statistical plan regulations file number REG-2008-00024, similar comments will be summarized and responded to as part of that rulemaking file. Moreover, this portion of the comment is not specifically directed at this regulation or at the procedures followed in proposing the regulation. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Commenter: Margaret M. Serrano-Foster on behalf of LandAmerica Financial Group, Inc.

Date of Comment: Received August 11, 2008

Type of Comment: Written

Summary of Comment:

This passage summarizes the commenter's interest in these proceedings and the nature of the organization that the commenter is affiliated with.

Response to Comment:

This portion of the comment is not specifically directed at the Commissioner's proposed regulation or to the procedures followed in proposing the regulation. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Summary of Comment:

In the interest of minimizing the volume of comments, the commenter incorporates by reference the comments submitted by the California Land Title Association, which the commenter supports.

Response to Comment:

The Commissioner incorporates by reference his summary and response to the comments presented by the California Land Title Association.

Commenter: David A. Cheit on behalf of First American Title Insurance Company

Date of Comment: Received August 12, 2008

Type of Comment: Written

Summary of Comment (Page 1):

The comment begins with an introduction that describes the nature of the rulemaking proceeding and the general effect that the proposed regulation and related rulemaking file REG-2008-00024 will have on the current state of the law.

Response to Comment:

This portion of the comment merely summarizes the effect of the proposed regulation. Because the first three paragraphs of the comment do not state an objection or recommendation directed at the proposed regulation, no response is necessary. (Gov. Code section 11346.9.)

Summary of Comment (Page 1-2):

The "Summary of Comments" section of the comment summarizes the positions set forth in greater detail within the "Discussion" section of the comment.

Response to Comment:

Because this passage of the comment is merely a summary of comments that are presented in more detail further within the comment, each detailed comment is considered and responded to below and therefore no further response is necessary here.

Summary of Comment (Pages 2-6):

The commenter notes that the Commissioner's powers are limited and defined by the statutes which grant the Commissioner his regulatory powers. The commenter then goes on to acknowledge and describe three articles that relate to the implementation and enforcement of a statistical plan and information reporting requirements. The commenter recites the purpose of Articles 5.5, 6.7 and 6.9 of Division 2, Part 6, Chapter 1 of the Insurance Code and occasionally quotes directly from particular portions of statutes contained within those articles to describe the scope of the Commissioner's powers.

Response to Comment:

The Commissioner recognizes and agrees that his powers are limited to those powers granted by statute. To the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intention to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected.

A fair reading of the Commissioner's proposed regulation cannot reasonably be construed to suggest that the Commissioner intends to operate in a manner contrary to statute. The purpose of the proposed regulation is to implement, interpret and make specific the principle that the Commissioner's general powers of examination, imposition of late fees and revocation and suspension proceedings also apply to an insurer's failure to collect or report data required by the Insurance Code. Any enforcement proceeding implemented in accordance with the regulation would, of course, be conducted in accordance with those laws which permit such a proceeding to occur.

To the extent that the remainder of this section is merely a restatement of existing law, the comment does not state an objection or recommendation directed at the proposed regulation. No response is, therefore, necessary. (Gov. Code section 11346.9.)

Summary of Comment (Pages 2, 3, 4 and 5):

The page numbers referenced above contain comments that all raise the same general issue. The commenter notes that the Commissioner's Initial Statement of Reasons does not list every statute that is contained within Articles 6.7 and 6.9. For example, in Article 6.7, the commenter notes that the Commissioner's Initial Statement of Reasons does not reference Insurance Code sections 12414.14, 12414.15 and 1241.16. While the Commissioner's Initial Statement of Reasons does reference Insurance Code sections 12414.17 and 12414.18, the commenter suggests that these

additional sections should also be referenced within the proposed regulation because they explain the hearing process that is referenced in sections 12414.17 and 12414.18.

Similarly, with respect to Article 6.9, the commenter notes that The Commissioner's Initial Statement of Reasons references four out of six statutory provisions contained within that Article. The commenter suggests that Insurance Code section 12414.24 should be referenced within the Initial Statement of Reasons because it applies to any willful effort to conceal information from, or failure to provide information to the Commissioner. Moreover, the commenter suggests that Insurance Code section 12414.25 should be referenced by the regulation because that section recognizes that monetary penalties may be assessed "in addition to any other penalties provided by this chapter."

Response to Comment:

To the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intention to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected.

A fair reading of the Commissioner's proposed regulation cannot reasonably be construed to suggest that the Commissioner intends to operate in a manner contrary to statute. The purpose of the proposed regulation is to implement, interpret and make specific the Commissioner's general powers of examination, imposition of late fees and revocation and suspension proceedings in order to make clear that those laws also apply to an insurer's failure to collect or report data required by the Insurance Code. Any enforcement proceeding implemented in accordance with the regulation would, of course, be conducted in accordance with those laws which permit such a proceeding to occur.

Notwithstanding what is stated above, and in order to remove any doubt about the Commissioner's intentions, the Commissioner has revised the regulation to include reference citations to a number of statutes, including Insurance Code sections 12414.14 through 12414.18, as well as to sections 12414.24 and 12414.25.

Summary of Comment (Page 6):

The commenter notes that while the proposed regulation is entitled "Statistical Plan Enforcement Remedies," the terms of the regulation indicate that the regulation's scope is not limited to statistical plan data.

The commenter then goes on to summarize the remedies made available to the Commissioner by the proposed regulation.

Response to Comment:

On April 9, 2009, the Commissioner revised the regulation title to read "Rate and Statistical Enforcement Remedies" in order to clarify that the regulation applies to data required to be collected and reported not only for purposes related to the statistical plan, but also for any other

data required to be collected and reported to aid the Commissioner's evaluation of title insurance and escrow rates.

Summary of Comment (Page 6):

The commenter notes that the proposed regulation does not distinguish between willful reporting failures and those that are not willful and does not set forth any provisions for enforcement measures to deal specifically with willful versus non-willful violations. Because the proposed regulation does not reference Insurance Code sections 12340.9, 12414.16(b), 12414.24 or related provisions which do make distinctions between willful and non-willful conduct, the commenter believes there is "substantial doubt as to whether the new regulation is intended to complement the existing protection (sic) or to circumvent them."

The commenter believes that the regulation should be rephrased if the Commissioner's intention is to apply the remedies within the existing structure of the statutes that gave the Commissioner his regulatory powers. If, on the other hand, the Commissioner's intention is to "circumvent existing remedies in a way that eliminates critical due process protections for any suspected failure to submit required data (sic: read "data"), regardless of the circumstances, then [the commenter] respectfully requests that the regulation be withdrawn..."

Response to Comment:

To the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intention to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected.

A fair reading of the Commissioner's proposed regulation cannot reasonably be construed to suggest that the Commissioner intends to operate in a manner contrary to statute. The purpose of the proposed regulation is to implement, interpret and make specific the principle that the Commissioner's general powers of examination, imposition of late fees and revocation and suspension proceedings also apply to an insurer's failure to collect or report data required by the Insurance Code. Any enforcement proceeding implemented in accordance with the regulation would, of course, be conducted in accordance with those laws which permit such a proceeding to occur.

Notwithstanding what is stated above, and in order to remove any doubt about the Commissioner's intentions, the Commissioner has revised the regulation to include reference citations to a number of statutes, including Insurance Code sections 12340.9, 12414.16, and 12414.24.

Summary of Comment (Page 7):

The commenter cites to a number of cases that recognize the principle that an agency's powers are limited to those that are authorized and consistent with the Legislature's regulatory grant. The commenter then goes on to note that the Legislature has defined the range of enforcement options in Article 6.7 that the Commissioner may use to address violations of Article 5.5. One

important consideration within the range of enforcement options available to the Commissioner, the commenter states, is the requirement that willful violations are to be treated differently from non-willful violations. The Commissioner, therefore, may not fashion enforcement procedures to deal with data reporting failures if those procedures are designed to disregard the willful/non-willful distinction devised by the Legislature.

Response to Comment:

To the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intention to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected.

A fair reading of the Commissioner's proposed regulation cannot reasonably be construed to suggest that the Commissioner intends to operate in a manner contrary to statute. The purpose of the proposed regulation is to implement, interpret and make specific the principle that the Commissioner's general powers of examination, imposition of late fees and revocation and suspension proceedings also apply to an insurer's failure to collect or report data required by the Insurance Code. Any enforcement proceeding implemented in accordance with the regulation would, of course, be conducted in accordance with those laws which permit such a proceeding to occur.

Notwithstanding what is stated above, and in order to remove any doubt about the Commissioner's intentions, the Commissioner has revised the regulation to include reference citations to a number of statutes that define the boundaries of the Commissioner's authority vis-à-vis willful or non-willful acts.

Summary of Comment (Page 8):

The commenter recommends that the Commissioner adopt an approach that is identical to the approach adopted in rulemaking file number REG-2008-00023, wherein the regulation would expressly confirm that the existing statutory remedies would apply to violations of the data reporting requirements. Thus, the regulation might read "in enforcing the provisions of this regulation, the Commissioner shall be entitled to the enforcement remedies provided for in Section 12414.13, Section 12414.14, Section 12414.15, Section 12414.16, Section 12414.17, and Section 12414.25 of the Insurance Code."

Response to Comment:

To the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intention to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected for the reasons given in the response to similar comments above. Similarly, the invitation to add the language proposed by the commenter is respectfully declined.

The April 9, 2009 revisions to the regulation include reference citations to sections 12414.14 through 12414.17 as well as to 12414.25 of the Insurance Code. Insurance Code section

12414.13 is not included within the reference citations because that section merely sets forth the procedure for filing a complaint with the Commissioner and does not address the Commissioner's available remedies.

Summary of Comment (Page 8):

Given that the Commissioner's stated rationale for the regulation is to make data reporting failures cost prohibitive, the commenter states that the Commissioner must make a distinction between "inadvertent or innocent" versus willful failures to report. If a violation occurs due to an innocent mistake, the imposition of a deterrence-based remedy would "make[] no sense."

Response to Comment:

The Commissioner rejects this comment and respectfully declines to revise the regulation in response to this comment. As is stated above, the Commissioner will employ his enforcement powers in a manner that is consistent with his Legislative authority, including the Legislature's instructions to the Commissioner when confronting a willful or non-willful act.

To the extent that this commenter believes that the imposition of a deterrence based remedy would make no sense when a violation is an "innocent mistake," the Commissioner disagrees. Deterrent measures serve to prevent future non-willful acts, including those acts that are performed negligently. Insofar as some insurers' mistakes may be a byproduct of lackadaisical or sub-standard data collection practices, the Commissioner reserves the right to use his enforcement powers and penalty assessments to compel such insurers to give greater attention to data collection practices in the future. To the extent that this comment suggests that inadvertent errors in data collection should be overlooked by the Commissioner, the commenter fails to appreciate the indispensable role that the title insurance industry must play to ensure careful, methodical and comprehensive data collection. Moreover, the commenter fails to appreciate the clarity of the information that the Commissioner will need in order to conduct an effective review of title insurance and escrow rates.

Summary of Comment (Page 8-9):

The Legislature has the option to revise its own thresholds in order to make a penalty cost-prohibitive by raising the statutory dollar limits of penalties for noncompliance. Just as the Commissioner may not disregard the dollar limits for penalties set forth by the Legislature, the Commissioner also must not disregard the due process protections that the Legislature has established by imposing strict liability for an alleged violation regardless of the extent of the violation, its scope or its context.

A strict liability standard in this regulation is particularly troubling given the nature of data reporting. The statistical plan, which has yet to be put into practice, will require some fine-tuning and will be an educational experience for both the Commissioner and those that will be subject to his regulations. Thus, rather than the imposition of a strict liability standard, the Commissioner should temper his use of his enforcement powers in recognition of the fact that the data reporting requirements are new. These new regulations will necessarily require some

trial and error before all parties involved will be able to fairly and fully understand and comply with the regulations.

Response to Comment

No reasonable reading of this regulation would lead to the conclusion that the Commissioner's regulation would require the imposition of "strict liability" for a violation of the data collection or reporting requirements of the Insurance Code. The regulation expressly recognizes the Commissioner's broad discretion to decide upon an appropriate remedy for a given violation of Articles 5.5 and 6.9. The Commissioner's regulation uses precatory language in describing the remedies that the Commissioner "may," but is not required to, use.

Moreover, to the extent that the commenter expresses a belief that the Commissioner's regulation reflects an intent to implement enforcement remedies in a manner that is contrary to the procedures and powers conferred by statute, the comment is misplaced and is rejected. A fair reading of the Commissioner's proposed regulation cannot reasonably be construed to suggest that the Commissioner intends to operate in a manner contrary to statute. The purpose of the proposed regulation is to implement, interpret and make specific the principle that the Commissioner's general powers of examination, imposition of late fees and revocation and suspension proceedings also apply to an insurer's failure to collect or report data required by the Insurance Code.

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June 2, 2009

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**TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER
SUBCHAPTER 3. INSURERS**

Summary and Response to Comments Received On or Before
April 29, 2009 Comment Period Deadline

Commenter: David A. Cheit on behalf of First American Title Insurance Company

Date of Comment: Received April 29, 2009

Type of Comment: Written

Summary of Comment (Page 1):

The comment begins with an introduction that describes the nature of the rulemaking proceeding and the general effect that the proposed regulation and related rulemaking file REG-2008-00024 will have on the current state of the law.

Response to Comment:

This portion of the comment merely summarizes the effect of the proposed regulation. Because the first three paragraphs of the comment do not state an objection or recommendation directed at the proposed regulation, no response is necessary. (Gov. Code section 11346.9.)

Summary of Comment (Page 1):

The commenter contends that the regulation “fails to incorporate or refer to Ins. Code §§ 12414.14 through 12414.16.” The commenter states that these statutory provisions require separate preliminary enforcement measures for non-willful violations of the Insurance Code. The commenter hypothesizes that, were the Commissioner to interpret these provisions in a way that did not require such preliminary measures, the Commissioner’s actions would exceed his authority.

Response to Comment:

The Commissioner rejects this comment and respectfully declines to make revisions based upon the comment. Contrary to the commenter’s suggestion, the April 9, 2009 revisions to the regulation expressly incorporated Insurance Code sections 12414.14 through 12414.16 into the regulation by way of the reference citation. These changes were made for the reasons explained

in greater detail in response to similar comments above and reconfirm that the Commissioner intends to implement his enforcement powers in a manner that is consistent with his statutory authority.

Summary of Comment (Page 1-2):

The commenter reads the April 9, 2009 revised regulation text as merely changing the title of the regulation from “Statistical Plan Enforcement Remedies” to “Rate and Statistical Plan Enforcement Remedies.” The commenter asserts that “[t]his change does not cure the defect in the original proposal. Instead, it expands the scope of that defect by expanding the scope of the enumerated remedies.”

Response to Comment:

The Commissioner rejects this comment and respectfully declines to make revisions based upon the comment. Because the original draft of the regulation duly notified affected regulated entities that it applied to “information required to be collected or reported in accordance with Articles 5.5 and 6.9,” the remedies set forth within the original draft of the regulation – by its plain terms - applied to data collected or reported for rates. Consequently, there is no reasonable basis to suggest that the April 9 addition of the term “Rate” in the title expands the scope of the regulation beyond the scope of the initial regulation proposal.

Indeed, this change is a technical, non-substantive change that did not require notice to the public. (See Gov. Code § 11346.8(c); see also Cal. Code Regs., tit. 1, § 40.) Nevertheless, in order to ensure full and comprehensive public participation in the development of this regulation, the Commissioner elected to invite public comment on his April 9, 2009 revisions. The commenter’s suggestion that this change expands the scope of the regulation, however, is misplaced and ignores the plain terms of the original proposal.

Summary of Comment (Page 2):

The commenter reasserts the objections set forth in his letter of August 8, 2008 and asks the Commissioner to revise the regulation in a manner consistent with his August 8 comments.

Response to Comment:

The Commissioner incorporates by reference his summary and response to the comments presented by First American Title Insurance Company on August 8, 2008.